clusive, admit it nevertheless as *prima facie* evidence of the surety's liability.[13] It is to be observed, however, that except as between parties and privies, a judgment is not competent to prove the facts upon which it is based,[14] and furthermore, if properly admissible, it is conclusive of such facts.[15] Still it is contended that since the surety may avail himself of a determination in favor of his principal,[16] the doctrine of mutuality requires that a judgment adverse to the principal be admissible against the surety. This argument apparently overlooks the fact that the latter can claim the benefit of the judgment in favor of his principal not because the creditor is estopped, but because it extinguishes the debt and consequently destroys, as a mere incident thereto, the obligation of the surety.[17] Moreover, since a judgment for the principal concludes the creditor,[18] this doctrine, if applicable at all, would operate to make the judgment conclusive and not *prima facie* evidence. Here too it would seem equally unavailing to resort to the terms of the contract in an attempt to justify this position, on the theory that the surety may be considered as having stipulated to become liable for whatever damages may be fixed in an action against the principal alone. If such were the agreement it is clear that the judgment should, merely by virtue of the contract, be conclusive of the surety's liability, rather than mere presumptive evidence. It is submitted, therefore, that unless the surety has agreed to be bound by the result of judicial proceedings, no rule of suretyship or of *res adjudicata* requires that in a subsequent action on his several contract,[19] a judgment adverse to the principal should be evidence of the surety's liability.[20]

NATURE OF A BUSINESS CONDUCTED BY A RECEIVER.—The appointment of a receiver is the recognized method employed by equity to preserve property pending litigation,[1] and by virtue of such proceedings the court in effect sequestrates the assets for the benefit of all who may ultimately prove an interest in them.[2] Inasmuch as a receiver is an

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[13]City of Lowell *v.* Parker (Mass. 1845) 10 Met. 309; Stephens *v.* Shafer (1879) 48 Wis. 54; Graves *v.* Bulkely (1881) 25 Kas. 249; Fletcher *v.* Jackson (1851) 23 Vt. 581; Berger *v.* Williams (1849) 4 McLean 577; Charles *v.* Hoskins (1863) 14 Ia. 471.

[14]2 Black, Judgments §§ 534, 600.

[15]Bethlehem *v.* Watertown (1883) 51 Conn. 490; Lucas *v.* Governor (1844) 6 Ala. 826; Arrington *v.* Porter (1872) 47 Ala. 714; Carmichael *v.* Governor (Miss. 1839) 3 How. 236; People *v.* Russell (N. Y. 1881) 25 Hun. 524; Pico *v.* Webster *supra.*

[16]Lamb *v.* Wahlenmaier (1904) 144 Cal. 91.

[17]See Jackson *v.* Griswold *supra;* McConnell *v.* Poor *supra.*

[18]State *v.* Parker (1882) 72 Ala. 181; Gill *v.* Morris (Tenn. 1882) 11 Heisk. 614; Crum *v.* Wilson (1883) 61 Miss. 233.

[19]And see note 6 *supra.*

[20]Pico *v.* Webster *supra;* McConnell *v.* Poor *supra;* Jackson *v.* Griswold *supra;* Giltinan *v.* Strong *supra;* Thomson *v.* MacGregor *supra;* Clark *v.* Montgomery (N. Y. 1856) 23 Barb. 464; De Greiff *v.* Wilson (1879) 30 N. J. Eq. 435; Grafton *v.* Hinkley (1901) 111 Wis. 46.

[1]High, Receivers § 9; Alderson, Receivers § 2.

[2]Ellicott *v.* Warford (1853) 4 Md. 80; Delany *v.* Mansfield (1825) 1 Hogan 234.

officer of the court,[3] his possession is in reality the possession of the tribunal which appointed him, and consequently he is directly responsible to that authority alone.[4] The power which he exercises over the assets in his hands is that of a mere custodian, and not that of an owner of the legal title[5] or of an assignee.[6]

In many jurisdictions, however, his powers have been so enlarged by statute that he may enforce all choses in action belonging to the person whose property has been placed in his custody.[7] In bringing such a suit he is then regarded as succeeding to the rights of that person, and all the defenses that could be set up against the latter may be pleaded against the receiver.[8] On the other hand, in the capacity of a representative of creditors, he may also institute an action to avoid fraudulent conveyances and to recover assets illegally transferred,[9] and for that purpose he is considered as holding adversely to the corporation or individual whose property is in his hands.[10] Where this rule obtains, the creditors usually lose the right to prosecute such a suit, as their equities become vested in the receiver by virtue of his appointment.[11]

While ordinarily the function of a receiver is merely to keep the property intact, he may nevertheless be authorized to continue the business of the person whose assets are in his custody, if such a power is essential to the preservation of their value,[12] and it is in such a situation that it becomes important to determine his relation to that person. If the latter is a corporation, the appointment of a receiver to carry on its business does not in itself operate as a dissolution,[13] and since the company still continues its corporate existence, suit may be brought against it on its obligations despite the receivership.[14] Such obligations, whether arising out of contract or tort, do not, however, merely by virtue of his appointment become claims against the re-

[3] *In re* Colvin (1851) 3 Md. Ch. Dec. 278, 300; Lottimer *v.* Lord (N. Y. 1855) 4 E. D. Smith 183.

[4] Field *v.* Jones (1852) 11 Ga. 413; Ohio & Miss. R. R. Co. *v.* Davis (1864) 23 Ind. 553.

[5] Foster *v.* Townshend (1877) 68 N. Y. 203; Dayton Hydraulic Co. *v.* Felsenthall (1902) 116 Fed. 961; Felter *v.* Maddock (N. Y. 1855) 11 Misc. 297.

[6] N. Y., P. & O. R. Co. *v.* N. Y. etc. Co. (1893) 58 Fed. 268; King *v.* Cutts (1869) 24 Wis. 627; see Quincy etc. R. R. Co. *v.* Humphreys (1892) 145 U. S. 82.

[7] High, Receivers § 447.

[8] Litchfield Bank *v.* Peck (1860) 29 Conn. 384.

[9] Receivers of Graham Button Co. *v.* Spielmann (N. J. 1892) 24 Atl. 571; Miller *v.* Mackenzie (1878) 29 N. J. Eq. 291; but see Republic Life Ins. Co. *v.* Swigert (1890) 135 Ill. 150.

[10] Alexander *v.* Relfe (1881) 74 Mo. 495.

[11] Nat. State Bank *v.* Vigo Co. Nat. Bank (1895) 141 Ind. 352; Attorney General *v.* Guardian Mut. Life Ins. Co. (1879) 77 N. Y. 272; Werner *v.* Murphy (1894) 60 Fed 769.

[12] Dayton *v.* Wilkes (N. Y. 1859) 17 How. Pr. 510.

[13] See City Water Co. *v.* Texas (1895) 88 Tex. 600.

[14] Pringle *v.* Woolworth (1882) 90 N. Y. 502; but see Insurance Commissioner *v.* Commercial Mut. Ins. Co. (1897) 20 R. I. 7.

ceiver.[15] Although he is consequently under no duty to carry out the agreements of the corporation or individual, he may nevertheless within a reasonable time elect to assume an executory contract made by the defendant, and in such an event he naturally becomes bound by it.[16] It is evident, therefore, that such obligations become enforceable against the receiver not by virtue of any relation which he sustains to the person whose property is in his hands, but because of the fact that in the exercise of his discretion for the benefit of creditors he has elected to assume them. The power to carry on the business, moreover, includes necessarily an authority to make such contracts as are incident thereto, and he may of course be sued in his official capacity on debts thus resulting.[17] All obligations arising in the course of the receivership are in effect claims against the sequestered assets, and so long as the receiver acts within the scope of his authority he incurs no personal liability.[18] Actions brought against him are in the nature of proceedings *in rem*, and subject the corpus of the property in his hands to the payment of debts only in case the income of the enterprise is insufficient therefor.[19] Inasmuch, however, as the receiver is, in the performance of his duties, constantly under the control of the court, he cannot be said to act as the agent of either party to the controversy, and consequently suit cannot be brought against the corporation or individual after the termination of the receivership on a debt contracted[20] or for a tort committed[21] during its continuance.

It would seem clear, therefore, that since claims against the person whose property has been sequestered do not become enforceable against the receiver and since the obligations incurred by the latter in no wise bind the former, the business conducted by a receiver in his official capacity must be considered as in effect a distinct enterprise. In spite of previous English decisions tending toward a contrary rule,[22] this view was recently upheld by the English Court of Appeal in *Whitney* v. *Moss Steamship Co., Ltd.* L. R. [1910] 2 K. B. 813. It appears that the receiver shipped goods under a bill of lading providing for a lien for all previous freight charges due from the same shipper, and it was held by a majority of the court that such contracts did not create a lien for transportation charges incurred prior to the receivership. The dissenting judge argued that the business could in no sense be considered as a distinct enterprise and that since the receiver in making

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[15]Central Trust Co. *v.* East Tennessee Land Co. (1897) 79 Fed. 19; Empire Distilling Co. *v.* M'Nulta (1897) 77 Fed. 700; Ames *v.* Union Pac. Ry. Co. (1894) 60 Fed. 966; McDermott *v.* Crook (1903) 20 App. D. C. 465.

[16]Spencer *v.* Columbian Exposition (1896) 163 Ill. 117.

[17]Thornton *v.* Highland Ave. & Belt. R. R. Co. (1891) 94 Ala. 353.

[18]Nason Mfg. Co. *v.* Garden (N. Y. 1900) 52 App. Div. 363; Olpherts *v.* Smith (N. Y. 1900) 54 App. Div. 514; Davis *v.* Duncan (1884) 19 Fed. 77.

[19]Thornton *v.* Highland Ave. Belt R. R. Co. *supra.*

[20]Brunner, Mond & Co., Ltd. *v.* Central Glass Factory (1897) 18 Ind. App. 174.

[21]Ohio & Miss. R. R. Co. *v.* Davis (1864) 23 Ind. 553; Eckels *v.* Farley (1907) 131 Ill. App. 557.

[22]*In re* Marriage Neave & Co. L. R. [1896] 2 Ch. 663; Paterson *v.* Gas Light & Coke Co. L. R. [1896] 2 Ch. 476; but see Corporation of Bacup *v.* Smith (1890) L. R. 44 Ch. Div. 395.

the contract acted merely as the agent of the corporation whose property was in his hands, the lien should attach. The majority, however, expressly repudiated this view, but seemed nevertheless to have considered that he acted as the representative of the debenture-holders at whose instance he was appointed. Although the latter argument seems unsound,[23] yet in view of the fact that the lien was sought to be asserted against the receiver with respect to charges due from the corporation whereas the terms of the contract covered only freight owed by the same shipper, the result reached is undoubtedly correct.

CRIMINAL JUDGMENTS AS *Res Adjudicata* IN CIVIL ACTIONS FOR PENALTIES.—The rule broadly stated that a verdict and judgment in a criminal prosecution cannot be pleaded as a bar to a subsequent civil action[1] finds its most obvious support in the argument based upon the usual diversity of parties in the two actions.[2] Since the doctrine of *res adjudicata* is properly invoked only between parties and their privies,[3] the fact that the State is charged with the conduct of the criminal prosecution whereas the civil controversy is between individuals, ordinarily renders it inapplicable in such cases.[4] Surely the enunciation of a contrary rule would result in a violation of the fundamental maxim[5] that no one shall be concluded by proceedings to which he was a stranger.[6] It is manifest, however, that this objection does not obtain where the State is the plaintiff in the civil as well as the criminal action and it is in precisely such circumstances that it becomes important to determine the exact scope of the principal under consideration.

However forceably it may be contended that to allow a civil judgment to be pleaded in a criminal action, would violate the constitutional rights of a person charged with a crime by virtually compelling him to be a witness against himself,[7] such an argument alone would seem to furnish no valid ground for refusing to consider at least a criminal verdict of conviction as *res adjudicata* in a civil suit. The fact that the available proof would be greater in the civil than in the criminal action, in that the accused might be compelled to testify in the former, would however prevent an acquittal being pleaded as *res adjudicata* in the civil proceeding. Manifestly this argument cannot avail in those jurisdictions where the civil action is so far penal in

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[23]Corporation of Bacup *v.* Smith *supra.*

[1]Chamberlain *v.* Pierson (1898) 87 Fed. 420; Betts *v.* New Hartford (1856) 25 Conn. 180; Summers *v.* Bergner Brewing Co. (1891) 143 Pa. St. 114; Doyle *v.* Gore (1895) 15 Mont. 212; see also People *v.* Kenyon (1892) 93 Mich. 19; State *v.* Bradnack (1897) 69 Conn. 212.

[2]Jones *v.* White (1718) 1 Strange 68; Petrie *v.* Nuttall (1856) 11 Exch. 569; Cottingham *v.* Weeks (1875) 54 Ga. 275.

[3]Cluff *v.* Mutual Benefit Life Ins. Co. (1868) 99 Mass. 317; 10 COLUMBIA LAW REVIEW 156.

[4]Schreiner *v.* High Court of I. C. O. of F. (1889) 35 Ill. App. 576; Wilson *v.* Manhattan Ry. Co. (N. Y. 1895) 2 Misc. 127; Doyle *v.* Gore *supra.*

[5]Corbley *v.* Wilson (1874) 71 Ill. 209.

[6]Hutchison *v.* Merchants' & Mechanics' Bank of Wheeling (1861) 41 Pa. St. 42.

[7]See State *v.* Corron (1905) 73 N. H. 434.